No. 89-1222

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1990

PERVESE AHKTAR, d/b/a CIRCLE MOBILE,

Petitioner,

v.

BIRD OIL COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

I. DOES THE FAILURE OR INABILITY TO POST A SUPERSEDEAS BOND JUSTIFY THE DISMISSAL OF AN APPEAL FROM A UNITED STATES DISTRICT COURT TO A UNITED STATES COURT OF APPEALS?

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

REFERENCE TO OPINIONS 1

STATEMENT OF JURISDICTIONAL GROUNDS 2

STATUTES OR RULES INVOLVED 3

STATEMENT OF THE CASE 4

ARGUMENT 7

APPENDIX 9

DISTRICT COURT ORDERS:

FILED MAY 9, 1989 9

FILED JULY 12, 1989 29

COURT OF APPEALS DECISIONS:

FILED OCTOBER 2, 1989 33

FILED OCTOBER 30, 1989 34

TABLE OF AUTHORITIES

Statutes — Page

15 U.S.C. § 2801 *et seq.* 4

15 U.S.C. § 2805 4

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1331 4

Rules

Rule 8(a), Federal Rules of Appellate Procedure 5

Rule 62(d), Federal Rules of Civil Procedure 3,5

Rule 17.1(a), United States Supreme Court Rules 7

Cases

In re Farrell Lines, Inc., 761 F.2d 796, 797 (D.C. Cir. 1985) 7

Koster & Wythe v. Massey, 262 F.2d 60, 62 (9th Cir. 1958) . 7

Thorpe v. Thorpe, 364 F.2d 692, 693 (D.C. Cir. 1966) 7

Miscellaneous

11 Wright & Miller, *Federal Practice and Procedure*, § 2905 (1973) 7

REFERENCE TO OPINIONS

The opinions and decisions of the United States District Court and the United States Court of Appeals in this case have not been published. These opinions and decisions are reprinted in the Appendix of this Petition.

STATEMENT OF JURISDICTIONAL GROUNDS

Review is sought of the Order entered by the United States Court of Appeals for the Fourth Circuit on October 2, 1989, in which Petitioner's appeal was ordered to be dismissed.

Petitioner's motion to reconsider this Order was denied by the Court of Appeals by an Order filed on October 30, 1989.

Jurisdiction to review these Orders by writ of certiorari is conferred upon the United States Supreme Court by 28 U.S.C. § 1254(1).

STATUTES OR RULES INVOLVED

Rule 62. Stay of Proceedings to Enforce a Judgment.

. . .

(d) Stay Upon Appeal. When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay subject to the exceptions contained in subdivision (a) of this rule. The bond may be given at or after the time of filing the notice of appeal or of procuring the order allowing the appeal, as the case may be. The stay is effective when the supersedeas bond is approved by the court.

FEDERAL RULES OF CIVIL PROCEDURE, Rule 62(d).

STATEMENT OF THE CASE

This action arises out of a dispute between the parties concerning the lease of a gas station located on Hilton Head Island, South Carolina, in which Bird Oil Company, Inc. is the landlord and Pervese Ahktar, doing business as "Circle Mobile", is the tenant. The Complaint includes a cause of action based upon the Petroleum Marketing Practices Act, 15 U.S.C. § 2801 *et seq*. This case was originally brought in state court and then removed to federal court, with federal jurisdiction based on 15 U.S.C. § 2805 and 28 U.S.C. § 1331.

Prior to trial, the parties settled the suit. Pursuant to the settlement agreement, Ahktar was to purchase the gas station from Bird Oil for a set price, with the closing on the sale to occur within sixty days after the South Carolina Department of Health and Environmental Control (DHEC) approved a remediation or clean-up project that had been ordered performed on the property due to a gas tank leak. The settlement agreement provided that Bird Oil would be financially responsible for the cost of the clean-up project up to $100,000.00, and that Ahktar would be responsible for the reasonable clean-up expenses in excess of $100,000.00.

A clean-up project was subsequently undertaken by Bird Oil, and the expenses exceeded $100,000.00. Ahktar objected to some of the expenses being claimed by Bird Oil as being unreasonable or excessive. Bird Oil filed a motion to compel specific performance of the settlement agreement. After holding a hearing, the District Court filed an Order on May 9 1989. In its Order, the District Court found that some of the claimed expenses were excessive or unreasonable, while others were reasonable. The Court entered a judgment against Ahktar totalling $94,941.99 ($25,000.00 and $48,101.52 in favor of Bird Oil and $21,840.47 in favor of "SRK", one of the contractors) on the expenses it found to be reasonable. The Court granted Bird Oil's request for specific performance, and ordered that the closing take place on June 8, 1989.

After the District Court issued this Order, and before the closing could take place, DHEC, by letter dated May 16, 1989, informed the parties that it was withdrawing its approval of the clean-up project and was re-opening the project for further remediation.

Ahktar then filed a motion to amend the judgment because of after-discovered evidence, or alternatively for a new trial, contending that the withdrawal of DHEC approval made it impossible for Bird Oil to convey to him a fee simple title free of liens and encumbrances. By Order filed July 12, 1989, the District Court denied this motion and set a new closing date for July 24, 1989.

On July 12, 1989, Ahktar filed his notice of appeal and moved before the District Court for a stay of enforcement of its Orders pending appeal, asking that the District Court not require the posting of a supersedeas bond as a prerequisite to obtain a stay. In its July 12, 1989 Order, the District Court denied this request stating:

> "[The] defendant (Ahktar) has filed a motion for a stay of the closing. He bases his motion on Rule 8(a) of the Federal Rules of Appellate Procedure. That rule, of course, requires that the party first seek a stay pending appeal in the district court. It is our understanding that the defendant filed a notice of appeal on July 12, 1989. As this court stated in its order of May 9th, strict compliance with Rule 62(d) shall be required in the event of appeal including the posting of a supersedeas bond in a amount equal to the amount due from the defendant on July 24, 1989, at the closing. The defendant has failed to post a supersedeas bond and his motion for a stay is hereby denied."

Appendix, pg. 32

Ahktar then proceeded with his appeal, intending to challenge the District Court's judgments against him totalling $94,941.99 in its May 9, 1989 Order, and also intending to challenge the District Court's finding in its July 12, 1989 Order that the closing should go forward despite DHEC's withdrawal of approval.

Unfortunately, Ahktar's appeal never got that far. Bird Oil filed a motion to dismiss the appeal on the ground that Ahktar did not post security for the appeal. By Order dated October 2, 1989 the Fourth Circuit Court of Appeals granted this motion and dismissed the appeal. Ahktar asked the Court of Appeals to reconsider its dismissal of his appeal, which it refused to do by Order dated October 30, 1989.

Ahktar now requests that this Court review the dismissal of his appeal by writ of certiorari.

ARGUMENT

Rule 17 of the United States Supreme Court Rules provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The Rule helpfully gives examples of reasons when review by writ of certiorari would be appropriate. One of the given examples is when a federal court of appeals has rendered a decision in conflict with the decision of another federal court on the same matter. *Id.*, Rule 17.1(a). That is exactly the situation in this case.

The Fourth Circuit Court of Appeals dismissed Ahktar's appeal because he had not posted a supersedeas bond.

The Ninth Circuit Court of Appeals has held that a "person who cannot furnish supersedeas bond does not lose his right to appeal." *Koster & Wythe v. Massey*, 262 F.2d 60, 62 (9th Cir. 1958).

The District of Columbia Court of Appeals has also held that "an appellant who fails to furnish a supersedeas bond does not thereby lose his right to appeal." *In re Farrell Lines, Inc.*, 761 F.2d 796, 797 (D.C. Cir. 1985). Accord, *Thorpe v. Thorpe*, 364 F.2d 692, 693 (D.C. Cir. 1966).

The Commentators have also recognized that "a person who cannot furnish a supersedeas bond does not lose his right to appeal". 11 Wright & Miller, *Federal Practice and Procedure*, § 2905 (1973).

In dismissing Ahktar's appeal in this case for failing to file a supersedeas bond, the Fourth Circuit Court of Appeals created a direct conflict with the rulings of its sister Courts of Appeals. This is precisely the type of situation which is suitable for review by writ of certiorari.

Respectfully Submitted,

James H. Moss
MOSS, DORE, KUHN
& McINTYRE, P.A.

Attorney for Petitioner

January 26, 1990

FILED MAY 9, 1989

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

BIRD OIL COMPANY, INC.,

Plaintiff,

vs. CIVIL ACTION NO. 2:86-1327-2

PERVESE AKHTAR, d/b/a
CIRCLE MOBIL,

Defendant.

AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER

This matter is before the court on motion of the plaintiff, Bird Oil Company, Inc. (Bird Oil), to enforce a settlement agreement entered into by the parties to this action. The settlement was agreed to in open court in Charleston, South Carolina, on March 3, 1987. The Defendant, Mr. Pervese Akhtar (Akhtar), now objects to certain costs the plaintiff contends he obligated himself to pay under the terms of the agreement as being excessive. He further alleges that because of these inflated expenditures he is relieved of his obligations under the settlement agreement. Because Mr. Akhtar objected to the cost of the remediation project and refused to tender performance, an evidentiary hearing as to the method and cost

of the project was held on September 29, and September 30, 1988. The court issued its findings of fact and conclusions of law in the matter on March 3, 1989.

Shortly thereafter, the defendant filed a motion to amend the findings of fact and judgment pursuant to Rule 52(b) of the Federal Rules of Civil Procedure. Except as hereinafter granted the motion is denied. The court has, however, determined that the defendant's objection to finding of fact #9 is partially correct. That objection states, in pertinent part: "the Court erroneously interpreted the November 25, 1987 letter from the Department of Health and Environmental Control as concluding that DHEC was satisfied with the soil remediation project, when in fact, an approval letter was not received until March, 1988..." A telephone conference was held between the parties and the court at which time the plaintiff was given fifteen (15) to respond to the defendant's motion and to make any other filings it deemed necessary. On April 3, 1989, the plaintiff filed a memorandum in opposition to the defendant's motion and a motion for an addendum to the order.

Because of the court's mistaken use of the November 25, 1987, date, several of the amounts listed in the March 3, 1989, order are incorrect and must be amended. Therefore, in the interest of clarity, the court issues these amended findings of fact and conclusions of law. The court's earlier order of March 3, 1989, is hereby rescinded.

The plaintiff's motion for an addendum to the order raises issues that were not addressed at the September 1988 hearing. Resolution of these issues would necessitate reopening the record and taking additional testimony. The plaintiff has made no such request and the court, if asked to do so, would be inclined to deny the same.

The court having heard the testimony of the several witnesses and considered the documentary evidence introduced at the hearing, makes the following findings of fact and conclusions of law pursuant to Rule 52 of the Federal Rules of Civil Procedure.

FINDINGS OF FACT

1. Plaintiff Bird Oil is a South Carolina corporation which has its principal place of business on Hilton Head Island, South Carolina. Bird Oil is engaged in the business of wholesale fuel sales and owns a service station known as the Circle Mobile Station located on Hilton Head Island, South Carolina. Mr. Akhtar is a resident of the State of Georgia.

2. Bird Oil and Akhtar entered into a settlement agreement on March 3, 1987. By the terms of the agreement Bird Oil agreed to sell to Akhtar all that property known as Circle Mobil located on Hilton Head Island, South Carolina. The purchase price was set at $450,000.00. The settlement required that the plaintiff institute an immediate soil remediation project to rectify environmental contamination of the soil at the location.[1] The agreement provided that the closing date for the transaction would be within a reasonable time, not to exceed sixty (60) days from the date of approval by the South Carolina Department of Health and Environmental Control (DHEC) of the soil remediation at the property.

3. In the agreement the plaintiff assumed financial responsibility for the cost of the soil remediation up to $100,000.00 All expenses therefor in excess of $100,000.00 were to be the responsibility of the defendant. At the settlement hearing in Charleston, South Carolina, on March 3, 1987, the settlement was explained as follows:

> Mr. Moss: The purchase price would be $450,000.00, and would be payable within a reasonable time for closing, not to exceed, I assume, 60 days from the

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[1] The South Carolina Department of Health and Environmental Control had ordered the soil remediation at the location because of ground contamination caused by gas leaks from the underground tanks located on the property.

approval by DHEC of the cleanup that I will explain to you in just a minute.

William Bird further agrees that he would be responsible for the first hundred thousand dollars to be spent on the cleanup of the premises concerning gas leaks, which DHEC alleges have occurred a number of years ago.

Quite frankly, we are not sure that even the gas leaks are attributable to Bird's station, because we know that unleaded product was found there, and the unleaded tanks weren't leaking. But in any event he's responsible for that hundred thousand.

Both parties will cooperate....

Mr. Byers: Excuse me one moment. Let the record show that's Bird Oil Company and not William Bird individually.

Mr. Moss: All right. In any event, both parties have some insurance, Judge. We are not sure to the extent that insurance will be available, but to the extent that insurance can be made available by either party for this, we certainly would agree to apply Mr. Akhtar's policy and Mr. Bird, I understand has a $20,000.00 policy that may apply, so to the extent that we can get insurance to pay this, certainly we would seek to recover that, but Mr. Bird would be responsible for the initial cost of the cleanup, up to $100,000.00.[2]

Mr. Bowen: That's Bird Oil Company, not Mr. Bird.

Mr. Moss: Bird Oil Company.

The Court: Let me ask you this Mr. Moss, the insurance that the parties have that may or may not be applied to the cleanup ordered by DHEC, will

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[2] It was subsequently determined that neither party could defray any of the expense of the soil remediation project with proceeds from insurance; therefore, insurance coverage is not an issue before the court.

it reduce this $100,000.00 amount, or will it be applied to the total cost?

Mr. Moss: It would reduce that $100,000.00 amount that he had to pay plus any cost above that if the insurance ... Mr. Akhtar has a million dollar policy. It's a liability policy. I am not sure it covers this. In fact, I am not counting on that it does.

The Court: Let's assume that Mr. Akhtar's policy pays $25,000.00 or $50,000.00 towards this cost. And Mr. Bird has a $25,000.00 policy that pays toward the cost. Would that $75,000.00 reduce Mr. Bird's obligation to $25,000.00?

Mr. Moss: As I understand it, yes, sir.

The Court: What if the initial cost of the cleanup is $200,000.00?

Mr. Moss: That Mr. Akhtar would pay the next $100,000.00 in cleanup costs.

Mr. Byars: That's our understanding, too, Your Honor. The insurance would initially accrue to Mr. Bird's benefit toward the $100,000.00

The Court: That is Mr. Bird's insurance that will accrue to his benefit or Mr. ...

Mr. Byars: All insurance or any third-party payments that might be received from anywhere.

The Court: ... Will accrue to Mr. Bird's benefit toward the $100,000.00.

Mr. Byars: For the first $100,000.00, and after that it would accrue to the next level.

The Court: And the next level, anything over $100,000.00 would be Mr. Akhtar's responsibility.

Mr. Moss: Yes, sir.

Now, Your Honor, Mr. Akhtar is going to vacate the premises in ten days, that's he and all his subcontractors will vacate the premises, and Bird Oil Company agrees to proceed with all due diligence to clean up the premises as required by DHEC.

> Your Honor, we don't know what they are going to require fully at this time, but Mr. Safran has been in touch with them at my firm, Mr. Byars has been in touch with them at Mr. Bird's firm, and as I understand it, to the extent that DHEC tells us whatever has got to be done, we are going to try to expedite that.

4. In compliance with the terms of the settlement agreement, the plaintiff initiated ground water contamination studies, sunk monitoring wells, obtained approval from DHEC of a method of remediation and instituted a soil remediation project at the property in November of 1987.

5. In March of 1987, Mr. Bird contacted Phillip Kimbrell, an hydrogeologist with the firm of Steffen, Robertson and Kirsten Consulting Engineers (SRK). Mr. Kimbrell was assigned the task of determining how best to proceed with the soil remediation project. After a thorough study of the possible methods of remediation, Mr. Kimbrell concluded that soil incineration would be the most time and cost effective method.[3] The soil incineration method requires that the contaminated soil be excavated and placed in an incinerator to burn out all of the contaminates. The soil is then placed back in the ground. This process is the least expensive and most time efficient way to remove the contamination from the property.

6. Bird Oil contracted with P&I for the soil remediation project and P&I subcontracted the incineration portion of the project out to Petroleum Services of Florida (Petroleum Services). There was conflicting testimony as to the actual

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[3] Two other methods of remediation were considered but rejected. The first involved removing the contaminated soil from the site to a landfill. Because this method would entail transportation of a hazardous waste to a restricted landfill it was concluded that the project would be a cost prohibitive. The second rejected method is known as "pump and treat". It involves pumping out the ground water and treating it until all contaminates are removed. Mr. Kimbrell rejected this method because it could take 5 years to complete and would cost anywhere from $250,000.00 to over $1,000,000.00.

terms of the contract between Bird Oil and P&I, but the defendant introduced into evidence an offer by P&I that was accepted by Bird Oil.[4] The court finds that this document, prepared by P&I and accepted and signed by Mr. Bird on November 11, 1987, constitutes the written agreement between Bird Oil and P&I for the soil remediation project. Under the terms of that agreement P&I was to be paid $50,900.00 for the removal of contaminates from 500 cubic yards of soil. Included in this price was the cost of labor and materials to P&I. The contract further provided that all required in excess of the 500 cubic yards would be at a cost to Bird Oil of $50.00 per cubic yard.[5]

7. The soil remediation project commenced on November 5, 1987. It is undisputed that additional fuel was spilled into the excavation site during removal of the tanks. The defendant claims that some 2,000 gallons of fuel was spilled, thereby significantly increasing the amount of contaminated soil. However, the testimony of Dee O'Brian, DHEC's representative on site, and Phillip Kimbrell, the hydrogeologist supervising the project, reveal that the actual spillage was between 50 and 150 gallons.

8. The testimony further showed that a portion of the spillage was water, thereby decreasing the amount of actual contaminates released into the excavation site. Because the site already contained standing water, the spilled fuel floated to the top. Mr. Kimbrell testified that, immediately following the spill, a towel-like product that absorbs fuel was placed in the

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[4] The offer was initially made on May 13, 1987, and contains provisions that were later struck from the agreement. See defendant's exhibit #10. The final agreement was signed by Mr. Bird on November 11, 1987. See defendant's exhibit #13.

[5] The defendant's objection to the court's interpretation of the terms of the P&I-Bird Oil contract is without merit. The contract is clear and unambiguous. Defendant would have this court ignore the provision of the contract which calls for soil removed in excess of 500 cubic yards to be at a cost to Bird Oil of $50.00 per cubic yard.

site to soak up as much of the spill as possible. He estimated that between 1 and 2 cubic yards of soil were contaminated by the spill. However, and most importantly, the soil in question was already contaminated and earmarked for excavation. Further, Mr. O'Brian, who has witnessed numerous tank removals, stated that spillage was a common occurrence and to be expected during removal operations. Therefore, the court finds that the spillage during the tank removal operation did not significantly add to the amount of contaminated soil or increase the total cost of the project. Furthermore, even if the cost was increased, that does not excuse performance by the defendant.[6]

9. The soil remediation project was completed by mid-November 1987. By letter dated November 25, 1987, DHEC informed the plaintiff that it was satisfied with the soil remediation of the site, but that continued monitoring would be necessary to ensure that further action was not required.[7] The plaintiff misinterpreted the November 25 letter as final approval by DHEC and thereafter made several demands on the defendant to consummate their agreement.[8] Instead, by letter dated December 22, 1987,[9] counsel for the defendant responded to the demand letter with the allegations that the cost of the project was grossly underestimated[10] and that the

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[6] The defendant seeks to impose supervisory responsibilities on Bird Oil that are not contained in the settlement agreement. Bird Oil did not agree to bear the cost of the negligence of any of the contractors. Therefore, assuming, arguendo, that the spill did increase the cost of the project, the defendant is responsible for that cost.

[7] Defendant's exhibit #26. This is the letter that the court erroneously interpreted as final approval in its March 3, 1989, order.

[8] Defendant's exhibit #27 and plaintiff's exhibit #27.

[9] Plaintiff's exhibit #28.

[10] The fact that SRK underestimated the pervasiveness of the contamination is, of course, no excuse for the defendant to breach its obligations. The (continued...)

spillage from the tanks caused additional damage. The defendant refused to tender any money for the expenses incurred in the soil remediation project. Negotiations proved fruitless and plaintiff filed its motion for enforcement of the settlement agreement on February 17, 1988.

10. At the September hearing, both parties admitted upon questioning by the court that final DHEC approval was procured on March 28, 1988.[11] Therefore, under the terms of the settlement agreement the closing date was to be no later than May 27, 1988.[12] Unfortunately, at this point the parties were in hopeless dispute as to whether the defendant was obligated to pay anything other than the purchase price of $450,000.00. Despite several demands by Bird Oil that the closing take place, the defendant on more than one occasion reiterated its position that it was not responsible for any of the soil remediation costs.[13]

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[10](...continued)
settlement agreement, which was entered into before SRK's assessment, contemplates that the defendant will bear financial responsibility for all remediation expenses in excess of $100,000.00. So long as the expenses incurred were reasonably necessary for remediation of the soil, it makes little difference that those expenses were in excess of SRK's initial estimate. Defendant does not claim, nor can he, that he reasonably relied on SRK's underassessment of the soil contamination when he entered into the settlement agreement. See plaintiff's exhibit #28.

[11] Plaintiff's exhibit #1

[12] The settlement agreement required that the transaction take place no later than sixty (60) days after approval by DHEC.

[13] In a letter dated December 22, 1987, the defendant sets forth his objections to the way in which the project was handled and then states: "In light of these facts, I believe that even you would admit we cannot accept the imposition of an additional one hundred twenty-five thousand ($125,000) dollars worth of liability." Plaintiff's exhibit #28.

In a letter dated May 26, 1988, the defendant through his attorney states: "I believe that the amounts above $450,000.00 are due to the negligence of William Bird and P&I Supply Company and the method which was used to excavate the dirt and the gasoline tanks.... Mr. Akhtar should not (continued...)

11. SRK's fee for services rendered as of July 31, 1988, was $26,948.00.[14] Mr. Kimbrell testified that since that time he had invested an additional ten (10) hours and that his hourly fee is $47.50. Therefore, as of the September 29th hearing SRK's total fee was $27,423.36. Of this amount Bird Oil has paid $5582.89, leaving a balance owing of $21,840.47. SRK assesses a finance charge of 1.5% per month for invoices not paid within 30 days of invoice date.[15]

12. The main dispute in this case centers around the final bill submitted by P&I.[16] Under the contract between P&I and Bird Oil,[17] P&I agreed to remove contaminates from 500 yards of soil for $50,900.00 and to remove the same from additional soil at a cost of $50.00 per cubic yard. The court finds that 2100 cubic yards of soil were removed during the project.[18] Therefore, under the terms of the contract, the allowable

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[13](...continued)
be held responsible for this negligence. Defendant's exhibit #23.

Defendant's argument that his tender of $450,000.00 constituted performance on his part is completely without merit. What is clear is that the defendant repudiated his obligation to pay a portion of the remediation cost on more than one occasion.

[14] Plaintiff's exhibit #3.

[15] At the time of the enforcement hearing in September 1988, the defendant made no objection to this invoice, but had refused to pay it. Now the defendant seeks to object to the 1.5% per month interest charge on the ground that he never contractually agreed to it. We find this argument frivolous; by the terms of the settlement agreement Bird Oil was the party responsible for procuring the necessary services. Further, the charge is within the legal limits allowed under South Carolina law. S.C. Code Ann. §37-2-201.

[16] Plaintiff's exhibit #5.

[17] In finding of fact #6 the court summarizes the contract between P&I and Bird Oil for the soil remediation project.

[18] 2100 cubic yards is the quantity agreed on by both P&I and Petroleum Services, the two contractors on site. Further, P&I paid Petroleum Services $63,000.00 or $30.00 per cubic yard for 2100 cubic yards total pursuant to their contract. See defendant's exhibit #22.

charges for the soil remediation are as follows:

500 cubic yards	$ 50,900.00
1600 cubic yards	80,000.00
	$130,900.00

The contract further states that labor and materials are included in that cost. Therefore, the charge for materials in the amount of $11,528.88 and for labor in the amount of $14,448.75 must be disallowed. The charge for water treatment and equipment rental, $7,203.34, is a reasonable and appropriate expense and will be allowed.[19]

13. The only other P&I charge objected to by the defendant is a $2000.00 bill for concrete removal. The testimony of Mr. Marion Hudson, president of P&I, revealed that the concrete was actually removed by Bird Oil at a cost of $1500.00. Mr. Hudson stated that Bird Oil was acting as P&I's subcontractor and that it is P&I's customary practice to add 25% to the bills of its subcontractors. In essence, P&I is attempting to make $500.00 by allowing the owner to do the work. In equity and good conscience this charge should be for $1500.00, the actual cost to Bird Oil for the work.[20]

14. Therefore, the allowable costs to P&I are as follows:

Soil remediation 2100 cu. yds.	$130,900.00
Evacuation	22,238.33
Water treatment & equipment rental	7,203.34
Mileage	910.00
	$161,251.67

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[19] The defendant objects to the $7,203.34 charge, but the court is not persuaded by his argument that these expenses were included in the base contract price. In fact, were P&I to do everything that the defendant alleges it agreed to do for a total price of $50,900.00 it would have lost a considerable amount of money on the project.

[20] Defendant's contention that the concrete was not removed was clearly refuted at the hearing. All the concrete around the underground tanks was removed as it would have been impossible to otherwise remove the tanks.

In addition, because of the defendant's refusal to bear any of the cost of the soil remediation, all but $37,106.66 of the amount due P&I went unpaid. P&I instituted legal proceedings in state court to collect on its contract with Bird Oil and sought to have a mechanic's lien placed on the property. In order to avoid foreclosure on the property, Bird Oil settled the case and paid P&I on its debt on April 8, 1988. The court finds that the terms of the settlement were reasonable and necessary in order for Bird Oil to protect the property. Pursuant to the terms of its settlement Bird Oil also paid P&I $4,321.08 in interest and $3,258.51 in attorney fees related to the state court action.[21] Bird Oil may not recover the interest and attorney fees because these were costs incurred by Bird Oil before the defendant had any obligation to consummate the transaction.[22]

15. On March 31, 1988, Bird Oil refinanced the loan on the Circle Mobil Station in an effort to satisfy the creditors of the soil remediation project and other mortgage holders. The new loan was in the amount of $430,000.00. The cost to Bird Oil of obtaining this new loan was $14,047.50.[23] Interest on the loan is eleven and one half percent per annum. A second mortgage was also obtained in the amount of $45,000.00 with interest of eleven and one half percent per annum. The cost to Bird Oil of obtaining this loan was $900.00.[24] Bird Oil may not look to the defendant for the cost of obtaining the refinancing because at the time it was procured the defendant was under no obligation to perform. However, the court finds

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[21] Plaintiff's exhibit #9.

[22] Bird Oil settled its debt with P&I in April 1988; Akhtar was not obligated to perform under the settlement until May 27, 1988.

[23] The cost breaks down as follows: application fee and appraisal $900.00 (Plaintiff's exhibit #19); survey $225.00 (plaintiff's exhibit #20); flood insurance $675.00 (plaintiff's exhibit #21); 2 discount loan points $8428.00; and closing costs and attorney fees $3,819.50.

[24] This cost was for 2 discount loan points.

that the interest rate on the refinancing, eleven and one half percent per annum, is convincing evidence of the cost of money to Bird Oil to the extent of the $475,000.00 financed at that rate.

16. All other expenses incurred during the soil remediation project were stipulated to by counsel of both parties.[25] They are as follows:

Savannah Labs[26]	$1204.00	Paid by Bird Oil
Jones and Frank	3000.00	$1500.00 paid by Bird Oil; $1500.00 paid by Akhtar
Sea Pines Public Service District[27]	272.00	Paid by Bird Oil
Geothermics[28]	1542.00	Paid by Bird Oil
Coastal Surveying[29]	441.27	Paid by Bird Oil
McCameron & Associates[30]	35.00	Paid by Bird Oil
Bird Oil & Co. (pump removal)[31]	1250.00	Unpaid
Hilton Head Auto Parts[32]	22.69	Paid by Bird Oil
Total	$7,766.96	

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[25] Defendant's objection to these expenses now after stipulating to them at the September 1988, hearing comes too late. Suffice it to say that he has presented no evidence to support his new allegation that he has paid those amounts. They are, therefore, due and owing.

[26] Plaintiff's exhibits #11 and 12.

[27] Plaintiff's exhibit #14.

[28] Plaintiff's exhibit #15.

[29] Plaintiff's exhibit #16.

[30] Plaintiff's exhibit #16.

[31] Plaintiff's exhibit #18.

[32] Plaintiff's exhibit #17.

CONCLUSIONS OF LAW

A. This court has jurisdiction over the subject matter of the action pursuant to 28 U.S.C. §1332, and venue is properly laid in this district under 28 U.S.C. §1391(a).

B. The court has personal jurisdiction over the defendant pursuant to §36-2-803 of the South Carolina Code, Annotated (1976), in that the cause of action arose from the defendant's transaction of business in the state of South Carolina.

C. It is well settled that a district court retains inherent jurisdiction and equitable power to enforce agreements entered into in settlement of litigation. *Ozyagcilar v. Davis*, 701 F.2d 306 (4th Cir. 1983); *Miller v. Norfolk and Western Ry. Co.*, 643 F.2d 1005 (4th Cir. 1981). However, it is clear that this court only retains the power to enforce complete settlement agreements; it does not have the power to impose, in the role of a final arbitrator, a settlement agreement where there was never a meeting of the parties' minds. *Ozyagcilar*, 701 F.2d at 308.

D. The first inquiry, then, is to determine whether there was a meeting of the minds between the parties as to the soil remediation project. At the settlement hearing in Charleston, South Carolina, on March 3, 1987, counsel for the defendant explained the settlement.[33] His statement conclusively establishes that there existed a meeting of the minds between the parties as to the terms of the settlement now in dispute. Therefore, under the dictates of *Ozyagcilar*, this court retains inherent jurisdiction and equitable power to enforce the agreement. The court concludes that the parties agreed that Bird Oil would "proceed with all due diligence to clean up the premises as required by DHEC." Further, the parties agreed that Bird Oil would be responsible for the initial $100,000.00 of expense incurred in remediating the soil and that Mr.

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[33] See finding of fact #3.

Akhtar would be responsible for any expense in excess of that amount.

E. This settlement agreement, like all contracts, contains an implied covenant of good faith and fair dealing. *Commercial Credit Corporation v. Nelson Motors*, 147 S.E.2d 481 (S.C. 1966); 17A C.J.S. *Contracts* §328. The covenant required that Bird Oil act reasonably to protect both its interests and the interests of Mr. Akhtar when procuring the services necessary for the soil remediation. However, once it is determined that Bird Oil did not breach its covenant of good faith and fair dealing, the court's only duty is to enforce the agreement entered into by the parties. Courts are without authority to alter a contract by construction or to make new contracts for the parties. Our duty is limited to the interpretation of the contract made by the parties themselves "... regardless of its wisdom or folly, apparent unreasonableness or failure to guard their rights carefully." *Gilstrap v. Culpepper*, 320 S.E.2d 445, 447 (S.C. 1984); *Blakely v. Rabon*, 266 S.C. 68, 73, 221 S.E.2d 767, 768 (1976).

F. The defendant, who was represented by counsel, chose not to concern himself with the task of procuring the necessary services to complete the soil remediation. While in hindsight, Mr. Akhtar claims that the costs were excessive and that he could have procured the services for less money, his argument is without merit. By the clear terms of his agreement, the defendant must bear the cost of the project in excess of $100,000.00. Furthermore, Mr. Akhtar cannot now claim that the parties did not anticipate that the project would cost more than $100,000.00. To the contrary, the settlement agreement clearly provided for such an occurrence.

G. In matters such as this, the plaintiff has the option of pursuing several remedies. In this case Bird Oil seeks to pursue specific performance rather than its remedy of recision. Specific performance of a contract is a matter of sound judicial discretion controlled by established principles of equity. *Wright v. Patrick*, 262 S.C. 434, 205 S.E.2d 175 (1974). In determining whether to grant or withhold relief of this sort, the court

should consider all of the circumstances of the particular case in the light of equitable principles. It is an elementary principle, of course, that one who seeks to invoke the equitable powers of the court to enforce a settlement to which he was a party, must show that the settlement has been performed on his part, or at least that he was at the appropriate time able, ready and willing so to perform it. *State v. Riley*, 64 S.E.2d 127 (S.C. 1951). It is also well settled in contract law that if a party by its contract charges itself with an obligation possible of performance, then the party must make good. *Pearce-Young-Angel Co., Inc. v. Charles R. Allen, Inc.* 50 S.E. 698 (S.C. 1948). A settlement contract may not be unilaterally rescinded. *Dacanay v. Mendoza*, 573 F.2d 1075, 1078 (9th Cir. 1978). Upon breach by one party, the other party may obtain damages or specific performance as appropriate. *United States v. ITT Continental Baking Co.*, 420 U.S. 223 (1975); *Village of Kaktavik v. Watt*, 689 F.2d 222 (D.C. Cir. 1982).

H. Applying the above principles, the court concludes that Bird Oil is entitled to specific performance. Bird Oil met all of its obligations under the settlement and stood ready, able and willing to proceed with the transaction on May 27, 1988. The court further concludes that the defendant indicated his intention to breach the settlement agreement by letter dated December 22, 1987,[34] and again by letter dated May 26, 1988,[35] and that he did, in fact; breach said agreement by refusing to consummate the agreement within the prescribed time.

I. Further, it appears clear to the court that Bird Oil incurred additional expense in the form of interest charges that are directly attributable to the defendant's breach. When a court orders specific performance, the decree must as nearly as possible order performance according to the terms of the agreement, and one of those terms is the date fixed by the agreement for its completion. This date having passed, the

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[34] Plaintiff's exhibit #28.

[35] Defendant's exhibit #23.

court, in order to relate the performance back to it, equalizes any losses occasioned by the delay by offsetting them with money payments. Often the result is more like an accounting between the parties than like an assessment of damages. *White v. Felkel*, 82 S.E.2d 813 (S.C. 1954), *citing, Specific Performance: Compensation or damages awarded purchaser for delay in conveyance in land*, 7 A.L.R. 1206. The court concludes that Bird Oil is entitled to compensation for the losses it suffered that were caused by the defendant's breach.

J. The total expense incurred as a result of the soil remediation project is as follows:

Soil Remediation Project

P&I Supply Co.	$161,251.67
SRK	27,423.36
Savannah Labs	1,204.00
Jones & Frank	3,000.00
Sea Pines Public Service District	272.00
Geothermics	1,542.00
Coastal Surveying	441.27
McCameron and Associates	35.00
Bird Oil Co.	1,250.00
Hilton Head Auto Parts	22.69
	$196,441.99

Of this amount, $196,441.99, Bird Oil is responsible for $100,000.00 and Mr. Akhtar is responsible for $96,441.99. As of September 30, 1988, Bird Oil had paid $171,851.52 of the expense and was owed an additional $1,250.00 for work it had done on the project. Mr. Akhtar had paid $1,500.00 and $21,840.47 was still owed to SRK. Therefore, at closing, Akhtar shall pay to Bird Oil the $450,000.00 purchase price, plus $71,851.52 for expenses owed by Akhtar but paid by Bird Oil, and $1,250.00 for work done by Bird Oil on the project. In

addition, Akhtar shall pay to SRK the amount of $21,840.47, the balance due for its services.

K. The remaining question concerns the appropriate rate of interest that the defendant shall be required to pay on his debt. Under a long line of South Carolina cases interest may accrue on even an unliquidated sum found owing a party "from the time the money should have been paid until the time of the judgment." *Montgomery Ward & Co. v. Collins Estate, Inc.*, 268 F.2d 830, 838 (4th Cir. 1959) (citing South Carolina authority); *see also, Johnson v. Aetna Insurance Company*, 308 F. Supp. 33, 36 (D.S.C. 1970). Moreover, the South Carolina courts and those in the Fourth Circuit have held that the rate of interest, whether recoverable specifically as interest, or included as an element of general damages, should not be determined according to any specific statutory rate, but should be reasonable in amount as the circumstances of the case warrant. *M.B.A.F.B. Federal Credit Union v. Cumis Insurance Society, Inc.*, 507 F. Supp. 794, 798 (D.S.C. 1981), *aff'd* 681 F.2d 930 (4th Cir. 1982). The value of money to the plaintiff at the times in question would normally determine what is a reasonable rate of interest. The problem is that, except for the finance charge of SRK, the only evidence bearing on this issue is the loan plaintiff refinanced on the property on March 31, 1988, and the situation is further complicated by the fact that those transactions only involved $475,000.00. We can, however, conclude that during the term of those loans the sum of $475.000.00 was worth 11 1/2% per annum to plaintiff. Beyond that, the failure of proof requires us to look to applicable statutes to determine a reasonable rate of interest to apply.

L. The purchase price of $450.000.00 was due and owing from Akhtar on May 27, 1988. Accrual of interest on this amount shall commence on May 27, 1988, and will continue to run until paid at the rate of 11.5% per annum.[36]

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[36] This rate reflects the actual cost to Bird Oil for the new loans. The defendant does not contest the reasonableness of this rate of interest. It (continued...)

M. As to the remaining balance due to Bird Oil from Akhtar, $25,000.00 of said amount shall accrue interest from May 27, 1988, and will continue to run until paid at the rate of 11.5% per annum. The remaining balance, $48,101.52, shall accrue interest from May 27, 1988, and will continue to run until paid at the present statutory rate of 9.15% per annum.

N. Finally, the defendant is responsible for the unpaid debt to SRK. The defendant shall pay to SRK the sum of $21,840.47 plus interest of 1.5% per month from September 30, 1988, until said sum is paid.

NOW, THEREFORE, IT IS ADJUDGED, ORDERED AND DECREED,

1. The parties shall consummate the closing on the real estate transaction not later than 12:00 noon June 8, 1989, in the clerk of court's office for Beaufort County. The plaintiff shall provide a general warranty deed subject to any restrictions on the property in exchange for a purchase price of $450,000.00, plus interest as enumerated above. All existing mortgages shall be satisfied out of the proceeds.

2. The defendant shall pay to the plaintiff at said closing the sums listed above plus interest as enumerated above.

3. The defendant shall pay to SRK at the closing the sum of $21,840.47 plus interest of 1.5% from September 30, 1988.

4. All other provisions of the settlement agreement shall be complied with.

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[36](...continued)
should be noted that this does not account for the full $475.000.00 in 11.5% loans. There remains $25,000.00 of said amount which will be dealt with hereinafter.

AND IT IS SO ORDERED.[37]

/s/ C. Weston Houck
C. WESTON HOUCK
UNITED STATES DISTRICT JUDGE

May 5, 1989
Florence, South Carolina

[37] The parties' attention is directed to Rule 62 of the Federal Rules of Civil Procedure, particularly paragraph (d) Strict compliance with the rule will be required in the event of appeal.

FILED JULY 12, 1989

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

BIRD OIL COMPANY, INC.,

Plaintiff,

vs. CIVIL ACTION NO. 2:86-1327-2

PERVESE AKHTAR, d/b/a
CIRCLE MOBIL,

Defendant.

ORDER

This matter came before the court on motion of the plaintiff, Bird Oil Company, Inc. (Bird Oil), to enforce a settlement agreement entered into by the parties to this action. The court issued its Amended Findings of Fact and Conclusions of Law on May 9, 1989. In that order we directed that the closing for the real estate transaction between Bird Oil and Mr. Akhtar take place no later than 12:00 noon June 8, 1989.[1] Shortly thereafter, on May 30, 1989, the defendant filed a motion to amend the judgment because of after discovered

[1] For a more detailed discussion of the settlement agreement and each party's obligation under it, see this court's Amended Findings of Fact and Conclusions of Law filed May 9, 1989.

evidence or, in the alternative, for a new trial. A hearing was convened in the matter in Charleston, South Carolina, on June 8, 1989, at which all parties and their attorneys were present. After several hours of testimony and argument, it was determined that the parties needed additional time in which to clarify the issues and applicable law. The hearing was recessed until June 27, 1989. In the meantime, the closing on the real estate transaction was postponed.

The pertinent facts are as follows. The settlement agreement between Bird Oil and Mr. Akhtar required that the closing take place within a reasonable time, not to exceed sixty (60) days from the date of approval by the South Carolina Department of Health and Environmental Control (DHEC) of the soil remediation project taking place at the property. Said final approval was received from DHEC by letter dated March 28, 1988.[2] Therefore, under the terms of the settlement agreement the closing date was to be no later than May 27, 1988. The court previously found in its order of May 9th that the defendant was in breach of the settlement agreement when he refused to close on that date.

Approximately one year later, after Akhtar should have performed under the settlement agreement, DHEC informed Bird Oil on May 16, 1989, of its decision to reopen the project for further remediation. In its letter, DHEC indicates that ground-water monitoring results from February 12, 1988, and March 21, 1988, show that ground water at the site is contaminated with hydrocarbons. Benzene levels in monitoring wells MW-1 and MW-2 greatly exceed the current state class GB ground-water standard of five (5) parts per billion for benzene.

The question then becomes what, if any, benzene standard was applicable when DHEC approved the cleanup of the instant property in March 1988. At the June hearing on the matter several former and current officials of DHEC, including

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[2] Plaintiff's exhibit #1.

its chief legal counsel, testified as to the applicable regulations as of March 1988 and now. It is clear that the only enforceable numerical standard for benzene is the Maximum Contaminant Level (MCL) of five (5) parts per billion. However, that standard did not become effective until January 9, 1989, some seven plus months after Akhtar should have performed under the settlement agreement. At the time of the approval in March 1988 there was no specific enforceable benzene standard applicable to the property.

Donald Duncan, who was Director of the Groundwater Division at DHEC at the time of the March approval testified that the applicable standard at the time was subjective and contained in 25 S.C. Code Ann. Reg. 61-68, para. E(11)(c). That regulation states that the levels for various contaminants are "[n]ot to exceed concentrations or amounts such as to interfere with use, actual or intended, as determined by the Department."[3] Using this standard DHEC looked at a number of factors, including the level of decrease in contaminants at the site, depth of groundwater, speed at which groundwater flows, and usage in the vicinity. It concluded that the remediation was satisfactory and approved the project. Therefore, the March 28th letter was a final approval made in accordance with DHEC standards then in force.

The issue of whether DHEC may reopen projects it has previously approved is, of course, not before us. The sole issue before this court is limited to whether this newly discovered evidence operates to excuse the defendant's breach of May 27th. Since under the terms of its settlement agreement, the defendant, but for his breach, would have been the owner of the property, we cannot see how events taking place almost a year later can operate to excuse the breach. Courts are without authority to alter a contract by construction or to make new contracts for the parties. Our duty is limited to the interpretation of the contract made by parties themselves

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[3]The regulation does not specifically mention benzene by name, but Duncan stated that benzene would be included under this section.

"...regardless of its wisdom or folly, apparent unreasonableness or failure to guard their rights carefully." *Gilstrap v. Culpepper*, 320 S.E.2d 445, 447 (S.C. 1984); *Blakely v. Rabon*, 226 S.C. 68, 73, 221 S.E.2d 767, 768 (1976).

In this case, the defendant, who was represented by counsel, chose to make the transaction contingent upon approval by DHEC of the project. That approval having been obtained, he was under an obligation to perform. Any dispute he now has is with DHEC, not Bird Oil. Therefore, the defendant's motion to amend the judgment or, in the alternative, for a new trial is hereby denied. The court's earlier order of May 9, 1989, is in full force and the closing shall take place no later than 2:30 P.M. July 24, 1989, as verbally ordered by the court on June 27, 1989.

In response to the court's verbal order of June 27, 1989, to the same effect as this order, the defendant has filed a motion for a stay of the closing. He bases his motion on Rule 8(a) of the Federal Rules of Appellate Procedure. That rule, of course, requires that the party first seek a stay pending appeal in the district court. It is our understanding that the defendant filed a notice of appeal on July 12, 1989. As this court stated in its order of May 9th, strict compliance with Rule 62(d) shall be required in the event of appeal including the posting of a supersedeas bond in an amount equal to the amount due from the defendant on July 24, 1989, at the closing. The defendant has failed to post a supersedeas bond and his motion for a stay is hereby denied.

AND IT IS SO ORDERED.

/s/ C. Weston Houck
C. WESTON HOUCK
UNITED STATES DISTRICT JUDGE

July 12,1989
Florence, South Carolina

FILED OCTOBER 2, 1989

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 89-2423

Bird Oil Company,

Plaintiff - Appellee,

v.

Perverse Akhtar
d/b/a Circle Mobil,

Defendant - Appellant.

Appeal from the United States District Court for the District of South Carolina, at Charleston. C. Weston Houck, District Judge.

Upon consideration of appellee's motion to dismiss this appeal, and the responses thereto,

It is ORDERED that appellee's motion to dismiss is granted.

Entered at the direction of Judge Russell, with the concurrence of Judge Sprouse and Judge Wilkins.

For the Court

JOHN M. GREACEN
Clerk

FILED OCTOBER 30, 1989

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 89-2423

Bird Oil Company,

Plaintiff - Appellee,

v.

Perverse Akhtar
d/b/a Circle Mobil,

Defendant - Appellant.

ORDER

Upon consideration of appellant's motion for reconsideration, modification, and vacation of this Court's order dismissing this appeal,

IT IS ORDERED that appellant's motion is denied.

Entered at the direction of Judge Russell, with the concurrence of Judge Sprouse and Judge Wilkins.

For the Court

JOHN M. GREACEN
Clerk